

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 CENTRAL PUGET SOUND REGION
3 STATE OF WASHINGTON
4

5 ANN AAGAARD, JUDY FISHER, BOB
6 FISHER, GLEN CONLEY AND SAVE A
7 VALUABLE ENVIRONMENT (SAVE),

8 Petitioners,

9 v.

10 CITY OF BOTHELL,
11

12 Respondent.
13

Case No. 15-3-0001

FINAL DECISION AND ORDER

14
15 **SYNOPSIS**

16 Petitioners challenge adoption of Ordinance No. 2163 (2014), which amended the
17 *IMAGINE BOTHELL...* Comprehensive Plan (Comp Plan), revised Subarea Plans, and
18 amended the Bothell Municipal Code (Code) in order to facilitate increased residential
19 development within the North Creek Fish and Wildlife Critical Habitat Protection Area. The
20 Board determines that the City's action is inconsistent with provisions of its Comprehensive
21 Plan, fails to protect critical area ecosystems from net loss as required by the Growth
22 Management Act, and substantially interferes with the statutory goal of protecting the
23 environment, including water quality. The Board remands the Ordinance to be brought into
24 compliance.
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27 **I. INTRODUCTION**

28 The City of Bothell is located between Lake Washington and Lake Sammamish on
29 the Sammamish River and straddles the boundary between King and Snohomish Counties.
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1 All water bodies within the City of Bothell flow south into the Sammamish River.¹

2 The property at issue here is approximately 220 acres² of land located within the
3 Bothell city limits³ which lies within North Creek Basin. Because the hydrologic functions of
4 the property make it important for anadromous fisheries,⁴ the area has been the focus of
5 multiple environmental studies and more than a decade of debate over land use policies,
6 including prior Growth Management challenges. This history is directly relevant to the
7 present case but, unfortunately, is not articulated clearly in either Petitioners' or
8 Respondent's many briefs. Reviewing seven prior Growth Board decisions (*Aagaard*,⁵
9 *FEARN*,⁶ *Fuhriman*,⁷ *MBA v. Bothell*,⁸ *Fuhriman II*,⁹ *Fuhriman III*,¹⁰ *Aagaard III*¹¹) and over
10 400 pages of scientific studies, the Board summarizes the relevant background information:
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14 ¹ Ex. 74, *North Creek Fish and Wildlife Critical Habitat Protection Area Study* prepared by Parametrix (October 2006) at 1- 2.

15 ² City's Prehearing Brief at 2.

16 ³ And, hence, within the City's Urban Growth Area because all land located within a City's boundaries is considered Urban Growth Area.

17 ⁴ In 1998, The Watershed Planning Act was enacted in Washington. The act encourages local governments to develop watershed plans using collaborative processes and based on water resource inventory areas (WRIAs). The property at issue in this case is situated in WRIA 8. Ex. 101: *Land Use Planning for Salmon Steelhead and Trout*, Washington Dept. of Fish and Wildlife (October 2009) at 30.

18 ⁵ *Aagaard v. City of Bothell (Aagaard)*, Final Decision and Order, GMHB No. 94-3-0011 (February 21, 1995).

19 ⁶ In *FEARN v. City of Bothell (FEARN)*, Petitioners complained that Bothell had failed to act to revise development regulations in light of the 2002 Buildable Lands Review (completed 9/1/2002) asserting Bothell was required "to attain the minimum standard for urban density of 4 dwelling units per net acre." The Board found that the challenge was premature because the City had until December 1, 2004, to complete its review to determine whether its comprehensive plan and implementing regulations complied with GMA in light of the Buildable Lands Review; take action indicating its determination; and, if necessary, take action to revise the comprehensive plan and/or regulations to achieve compliance. The challenge was dismissed. *FEARN*, Order on Motions, GMHB 04-3-0016c (May 20, 2004) at 3, 9.

20 ⁷ On December 1, 2004, Bothell passed a resolution expressing the City's intent to endeavor to complete that task in early 2005. Fuhriman promptly filed a GMA challenge before the Board for failure to update implementing development regulations. *Fuhriman v. City of Bothell (Fuhriman)*, GMHB No. 04-3-0027, Order Finding Noncompliance, (January 12, 2005).

21 ⁸ Two weeks after the *Fuhriman* Order Finding Noncompliance directing Bothell to take necessary action by July 11, 2005, the Master Builders filed an identical challenge, which was dismissed and joined to the Fuhriman Compliance Proceeding. *Master Builders of King and Snohomish Counties*, GMHB No. 04-3-0027, Order of Dismissal and Joining "MBA" to "Fuhriman" Compliance Proceeding (February 1, 2005) at 1-3.

22 ⁹ Within 60 days of Bothell's 2004 Comp Plan update, the Board received 6 separate petitions for review challenging Bothell's residential land use designations and the City's definition of "net buildable area." One developer and Futurewise entered into settlement negotiations while the other four petitioners were consolidated into one case. *Fuhriman v. City of Bothell (Fuhriman II)*, Final Decision and Order, GMHB 05-3-0025c (August 29, 2005) at 1-2.

1 Petitioners are civic activists engaged in preserving the natural hydrology and fish
2 habitat of the North Creek headwaters since, at the least, Bothell's adoption of its first Comp
3 Plan in 1994. Opposing them since at least 2002 have been development interests
4 promoting higher minimum density requirements in the areas at issue. The Buildable Lands
5 Program was adopted by the state legislature as an amendment to the Growth Management
6 Act (GMA, or Act) to insure that counties and cities¹² had an adequate amount of residential,
7 commercial, and industrial land to meet the growth needs identified in their comprehensive
8 plans. More specifically, the program was aimed at determining if planning jurisdictions were
9 achieving urban densities within urban growth areas. Urban growth areas are set by
10 counties, and all land within a city is, by definition, within an urban growth area. Cities may
11 also have unincorporated areas of a county included in their larger planning areas (where
12 annexation is likely, for example).

13
14 The first Buildable Lands Report was completed in 2002. In 2003, Aagaard and
15 others were actively negotiating with Bothell over development regulations, although their
16 GMA challenge was ultimately dismissed. *See Aagaard II*. Next, the City commissioned a
17 report, *City of Bothell Streams and Riparian Areas: Best Available Science* (hereafter
18 Bothell BAS Report), to provide the scientific foundation for updating its Critical Areas
19 Ordinance (CAO) and related environmental policies and programs.¹³ Although nearly 98
20 percent of the North Creek basin is within the Urban Growth Areas¹⁴ of Snohomish and King
21 County, the report noted that:

22 [It] currently has a higher level of biological integrity... than most urban
23 streams, in part because it has such extensive wetlands, which buffer some
24 of the typical impacts of urbanization on water quality and flows. It also has
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27 ¹⁰ Within a month of the Board finding that Bothell had complied with the Board's Order to amend its
28 development regulations in light of the Buildable Lands Report and dismissing *Fuhriman*, Petitioner Fuhriman
29 filed a petition for review challenging those amendments to Bothell's development regulations. Petitioner
ultimately withdrew the challenge several hours before the Hearing on the Merits and the case was dismissed.

30 ¹¹ *Aagaard v. City of Bothell (Aagaard III)*, Final Decisions and Order, GMHB No. 08-3-0002 (October 24,
2008)

31 ¹² Specifically, it applied to Snohomish, King, Kitsap, Pierce, Thurston and Clark counties.

32 ¹³ Ex. 84, "Bothell BAS Report," *City of Bothell Streams and Riparian Areas: Best Available Science* (October
7, 2004) at 1.

¹⁴ Ex. 84, *City of Bothell Streams and Riparian Areas: Best Available Science* (October 7, 2004) at 1.

1 reaches (particularly between 240th St. SE and 228th St. SE) and tributaries
2 (particularly Palm and Coal Creeks) with remarkably good stream and
3 riparian habitat for an urban area. Protecting these reaches and tributaries
4 should be a high priority for Bothell's critical area regulations.¹⁵

5 In response, Bothell designated the North Creek Fish and Wildlife Critical Habitat
6 Protection Area (North Creek Protection Area) in its December 2004 Comp Plan update "to
7 protect this area, which includes critical areas "large in scope, complex in function and
8 structure and of high rank order value" and said to be "hydrologically connected through
9 numerous wetlands and several creeks" and to contain "fish and wildlife habitat
10 conservation areas" ¹⁶ The North Creek Protection Area is within the City's corporate
11 limits and comprises the Fitzgerald/35th Ave SE and Canyon Creek/39th Ave SE Subareas
12 (hereafter "Fitzgerald Subarea"). ¹⁷ The Fitzgerald Subarea plan identified the following
13 policy for the North Creek Protection Area:

14
15 Protect the quantity and quality of cool groundwater inputs into Palm, Woods
16 and Cole Creeks. ... [A]ll **development activities which may affect**
17 **groundwater ... [should] follow the existing topographic contours,**
18 **minimize changes to pre-existing ground elevations, minimize cut and**
19 **fill earthwork volumes and preserve natural foliage and vegetation.**
20 Excavation shall be prohibited from intruding into that part of the groundwater
21 table which experiences saturated soil conditions, as measured during the
22 dry season.

23 . . . [D]evelopment regulations should include special provisions
24 concerning critical area buffers, surface water runoff standards,
25 groundwater protections, impervious surface limitations, foliage
26 retention and potential low impact development provisions.¹⁸

27 Considering what development regulations would be appropriate, the Planning
28 Commission observed that "[t]he Fitzgerald/35th Ave SE Subarea contains one of the very
29 best reaches of North Creek within the City of Bothell and contains tributaries to North
30 Creek which also exhibit high quality fish habitat features" and that "scientific sources have

31 ¹⁵ Ex. 84, *City of Bothell Streams and Riparian Areas: Best Available Science* (October 7, 2004) at 1.

32 ¹⁶ City's Prehearing Brief at 2-3 (citing *Fuhriman II* at 35) and at 5.

¹⁷ City's Prehearing Brief at 2.

¹⁸ Ex. 74, Parametrix Study, October 2006 at 1-1.(emphasis added)

1 demonstrated that retaining native vegetation, minimizing impervious surface coverage,
2 implementing surface water runoff controls, and establishing non-disturbance buffers are all
3 vital protections for streams, fish habitat and other critical areas.” To protect these sensitive
4 areas, the Commission recommended establishing a special low impact development
5 overlay (LID Overlay) designation which would be applied to ALL parcels containing a
6 critical area or associated buffer. A LID Overlay was to require “a suite of special protections
7 intended to protect these sensitive systems from urban development,” including
8 preservation of natural, existing vegetation, applying impervious surface coverage
9 limitations, and implementing special stormwater standards.¹⁹

11 Instead, the Council chose to assign low-density residential zoning (R40,000, or
12 approximately one home per acre) to over 350 acres of the Fitzgerald Subarea. Within two
13 months of Bothell’s enactment of the Comp Plan amendment, pro-development interests
14 filed five separate GMA challenges complaining, inter alia, that Bothell’s residential land use
15 designations and the City’s definition of “net buildable area” were inadequate to meet urban
16 density requirements.²⁰ The essential issues were (1) how urban residential density is
17 calculated, and (2) whether the use of minimum lot sizes provided for an urban density of 4
18 dwelling units per acre (du/acre).²¹

20 Although the parties to the resulting consolidated case, *Fuhriman II*, characterized
21 their conflict as being whether urban residential density is calculated on a *gross* acreage
22 basis or a *net* acreage basis, the Board noted the Act does not require use of either
23 methodology and decided that Bothell was within its discretion to deduct unbuildable acres
24 from the gross land area (including critical area buffers), equate net acreage with buildable
25 acreage, and arrive at a *net density* of 4 du/acre.²²

27 The Board analyzed the City’s argument that larger minimum lot sizes within the
28 Canyon Creek and Fitzgerald Subareas are appropriate to protect hydrologically connected
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30 ¹⁹ *Fuhriman II*, Final Decision and Order (August 29, 2005) at 34-36.

31 ²⁰ *Fuhriman II* at 20-32.

32 ²¹ *Id.*

²² *Fuhriman II* at 20-32. Note: the Supreme Court has since ruled that the 4 du/acre standard is an impermissible bright-line rule. *Viking Properties, Inc., v. Holm*, 155 Wn.2d 112, 129-131, 118 P.3d 322 (2005).

1 wetlands and streams and the North Creek Protection Area that are (1) large in scope, (2)
2 complex in function and structure, and (3) of high rank order value.²³ Although the Planning
3 Commission had recommended a LID Overlay of restrictive development regulations, the
4 Board decided that it was not clearly erroneous for the City to instead choose minimum lot
5 sizes to protect the unique natural resource of the North Creek system.²⁴

6
7 A year later, the City had three property-owner-initiated Comp Plan amendment
8 requests for the Fitzgerald Subarea before it. The Council commissioned a study of the
9 North Creek Protection Area, the *North Creek Fish and Wildlife Critical Habitat Protection*
10 *Area Study* (hereafter the Parametrix Study), to identify appropriate land uses and
11 intensities²⁵ and create implementing regulations.²⁶ The Parametrix Study noted that Cole,²⁷
12 Woods, and Palm Creeks are within the North Creek Protection Area and form part of a
13 wetland/stream complex of tributaries to North Creek that is a likely source of low
14 temperature water flows important in maintaining summer low flow conditions capable of
15 supporting spawning runs of coho salmon and steelhead, and to a lesser extent Chinook
16 and sockeye salmon.²⁸ Thus ordinances enacted in 2006 and 2007 rezoned much of the
17 North Creek Protection area to allow smaller minimum lot sizes but set ratios for minimum
18 forest cover and maximum effective impervious surface area (Effective Impervious Area)
19 and committed the City to develop Low Impact Development policies and designate wildlife
20 corridors.²⁹

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23 In 2008, the Council again debated at length development regulation revisions for the
24 North Creek Protection area. Developers still wanted higher density but the Council was
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27 ²³ Use of these factors comports with the analysis used by the Board in *Litowitz, et al., v. City of Federal Way*
28 (*Litowitz*), GMHB No. 96-3-0005, Final Decision and Order (July 22, 1996), which has since become known as
the “*Litowitz Test*.”

29 ²⁴ *Aagaard III* at 5-6.

30 ²⁵ At the time, the City Council was considering three property-owner-initiated Comp Plan amendment
requests within the Fitzgerald Subarea.

31 ²⁶ The Parametrix Study addressed groundwater, surface water, fish and wildlife habitat, and related critical
areas. See Ex. 74: “Parametrix Study” (October 2006) at 1.

32 ²⁷ Spelled “Coal” in Exhibit B-2 to the Ordinance but “Cole” in the Parametrix Study and City Brief at 2.

²⁸ Ex. 74, “Parametrix Study” (October 2006) at 1-2.

²⁹ *Aagaard III* at 6.

1 committed to protecting this “critical, and highly sensitive, environmental area.”³⁰ This time
2 the City chose to implement LID Overlay regulations to limit development likely to injure the
3 North Creek Protection Area. Nevertheless, civic activists challenged the enactment,
4 concerned, *inter alia*, about a Lot Modification Provision³¹ that allows the Community
5 Development Director to reduce minimum lot size by up to 50% to accommodate low impact
6 development. The Board upheld the City’s plan, finding that the Lot Modification Provisions
7 were amply conditioned and consistent with the Comp Plan and the GMA goal of
8 environmental protection.³²

10 Subsequently, Washington experienced a recession (resulting from a dramatic
11 adjustment in financial and housing markets) from which it is making a slow recovery. Since
12 2007, Bothell received only one four-lot subdivision within the LID Overlay.³³ City staff
13 interviewed developers who made numerous complaints, significantly that (1) LID Overlay
14 regulations were overly complicated; (2) developers want a predictable lot/dwelling unit yield
15 calculation that would guarantee the number of du/acre without having to deduct critical
16 areas and surface water facilities; (3) a 20% Effective Impervious Area limit is too vague and
17 does not allow attainment of 7 du/acre; and (4) forest cover provisions are “too complex.”

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21 ³⁰ Ex. 64, letter from former Councilmember Tobin to Mayor and Council (October 19, 2014) at 1.

22 ³¹ BMC 12.52.040.C.1 provided in its entirety:

23 To accommodate Low Impact Development, the community development director is authorized to
24 modify chapters 12.14, 12.16, 12.18, and 12.20, of BMC, Title 12, Zoning, as specifically described
25 below without the need for a variance as provided for in BMC Chapter 12.36. The City of Bothell shall
26 decline to approve modifications in cases where conflicts occur with *Imagine Bothell...* Comprehensive
27 Plan and Fitzgerald/35th Avenue SE subarea plan policies or if the public health, safety and welfare
28 would not be furthered by the proposed modification.

29 a. BMC 12.14.030.A may be modified pursuant to the following:

30 (i) Within the R 40,000 (LID) and R 9,600 (LID) zoning classifications, the minimum lot area per
31 single-family dwelling unit may be reduced by as much as 50%. For example, properties with a
32 zoning classification of R 9,600 (LID) may have a minimum lot area of 4,800 square feet.

(ii) Within the R 40,000 (LID) and R 9,600 (LID) zoning classifications, minimum lot circle diameter
may be reduced by as much as 50%. For example, properties with a zoning classification of R
9,600 (LID) may have a minimum lot circle diameter of 40 feet.

(iii) Lots which are modified under BMC 12.52.040.C.1.(1) and (11) shall provide for a special
setback of 25 feet along common property lines whenever such lots are located within 50 feet of
an existing primary single family building.

³² *Aagaard III* at 1.

³³ Ex. 13-A: Council agenda Staff Report (July 8, 2014) at 3. See also Ricketts Subplat (Ex. 90).

Against this backdrop, Bothell passed Ordinance 2163 (2014) amending its Comp Plan and Municipal Code to “simplify” the regulatory language and facilitate residential development because “the existing LID [O]verlay regulations implement so many restrictions and protection that development is effectively thwarted from occurring.”³⁴ Petitioners assert the City has reduced “to the point of meaninglessness, essential regulations” necessary to ensure preservation of the North Creek Protection Area.³⁵

II. STANDARD OF REVIEW

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.³⁶ The scope of the Board's review is limited to determining whether a City has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.³⁷ The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.³⁸ The Board shall find compliance unless it determines that the City's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.³⁹ In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."⁴⁰ Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.⁴¹ This presumption creates a high threshold for challengers as the burden is on the

³⁴ Appendix A to Ordinance 2163, *Council Findings, Conclusions, and Action* at 8.

³⁵ Petitioners' Prehearing Brief at 1-2.

³⁶ RCW 36.70A.280, RCW 36.70A.302.

³⁷ RCW 36.70A.290(1).

³⁸ RCW 36.70A.320(3).

39 *Id.*

⁴⁰ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also *Swinomish Tribe v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

⁴¹ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] “comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.”

petitioners to demonstrate that any action taken by the City is not in compliance with the GMA.⁴²

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize “the broad range of discretion that may be exercised by counties and cities” and to “grant deference to counties and cities in how they plan for growth.”⁴³ However, the city’s actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.⁴⁴ Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the City is clearly erroneous in light of the goals and requirements of the GMA.

III. DISCUSSION/ ANALYSIS

The Petition for Review advances eleven issue statements, attached as Appendix A, which turn on the eight questions discussed below.

A. Inconsistency with the Comp Plan and failure to comply with GMA Goals.

- *Is the Ordinance internally inconsistent with the Comp Plan in violation in of RCW 36.70A.070, RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)? (Issues 1,⁴⁵ 3,⁴⁶ 4,⁴⁷*

⁴² RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] “the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.”

⁴³ RCW 36.70A.320(1) provides, in relevant part: “In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county’s or city’s future rests with that community.”

⁴⁴ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction’s] actions a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard. *Id.* at 435, n.8.

⁴⁵ Did the City fail to comply with RCW 36.70A.070(preamble), RCW 36.70A.130(1)(d) and RCW 36.70A.040(3) because the Proposed Plan Amendments for the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-2 to the Ordinance), and their respective elements and underlying policies for Land Use, Natural Environment, Urban Design and Transportation are not internally consistent with the goals, elements and policies in Respondent’s *Imagine Bothell Comprehensive Plan*, LU-P4

and 6⁴⁸)

- *Does the Ordinance fail to comply with GMA Goals for Urban Growth, Transportation, Open Space and Recreation, and Environment identified in RCW 36.70A.20 because the Subarea Plan Amendments were adopted without adequate consideration of water resources, water quality, low impact development, and habitat protection? (Issues 2⁴⁹ and 5⁵⁰)*

Petitioners' allege Ordinance 2163 results in development regulations that are inconsistent with the Comp Plan because they will allow development in the North Creek Protection Area likely to injure sensitive fish habitat⁵¹ in contravention of the City's Natural Element polices.⁵²

– LU-P11, *Imagine Bothell Natural Environmental Policies* NE-P8, NE-P13, NE-P14, NE-P20, NE-P21, NE-P26, NE-P33, NE-P36, NE-P38, and *Imagine Bothell Urban Design Policy* UD-P7 and *Transportation Policy* TR-G1, TR-G2, TR-G4, TR-P7?

⁴⁶ Did the City fail to comply with RCW 36.70A.040(3), RCW 36.70A.070 (preamble) and RCW 36.70A.070(1) because the Proposed Plan Amendments for the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-2 to the Ordinance), and their respective elements and underlying policies for Land Use, Natural Environment, Urban Design and Transportation, were adopted without adequate consideration of water resources, water quality, low impact development, and fish and wildlife protection in forested and riparian areas?

⁴⁷ Did the City fail to comply with RCW 36.70A.070 (preamble), RCW 36.70A.130(1)(d) and RCW 36.70A.040(3) because the amendments to the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-3 to the Ordinance) are not internally consistent with the elements and policies in Respondent's *Imagine Bothell Comprehensive Plan*, including but not limited to the *Imagine Bothell Natural Environmental Policies* NE-P8, NE-P13, NE-P14, NE-P20, NE-P21, NE-P26, NE-P33, NE-P36, NE-P38, and *Imagine Bothell Land Use Policy* LU-P4, LU-P11?

⁴⁸ Did the City fail to comply with RCW 36.70A.040(3), RCW 36.70A.070 (preamble) and RCW 36.70A.070(1) because the amendments to the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-3 to the Ordinance) were adopted without adequate consideration of water resources, water quality, low impact development, and fish and wildlife protection in forested and riparian areas?

⁴⁹ Did the City fail to comply RCW 36.70A.020 Goal 1 (Urban Growth), Goal 3 (Transportation), Goal 9 (Open Space and Recreation) and Goal 10 (Environment) of the Growth Management Act because the Proposed Plan Amendments for the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-2 to the Ordinance), and their respective elements and underlying policies for Land Use, Natural Environment, Urban Design and Transportation were adopted without adequate consideration of water resources, water quality, low impact development, and fish and wildlife protection in forested and riparian areas?

⁵⁰ Did the City fail to comply with RCW 36.70A.020 Goal 1 (Urban Growth), Goal 3 (Transportation), Goal 9 (Open Space and Recreation) and Goal 10 (Environment) of the Growth Management Act because the amendments to the Fitzgerald/35th Avenue SE Subarea and the Canyon Creek/39th Avenue SE Subarea (Exhibit B-3 to the Ordinance) were adopted without adequate consideration of water resources, water quality, low impact development, and fish and wildlife protection in forested and riparian areas?

⁵¹ Petitioners' Prehearing Brief at 1-2.

⁵² Petitioners' Prehearing Brief at 8, 13.

1 Ordinance 2163 made changes to the LID Overlay regulations that (1) established
2 forest cover retention standards (both substantially decreasing the minimum requirements
3 and redefining what constitutes adequate forest cover), (2) eliminated Effective Impervious
4 Area limits, and (3) revised the standards for ground excavation and wildlife corridors.⁵³
5 Petitioners allege that the record, as evidenced by a substantial collection of science-based
6 submissions,⁵⁴ shows that these changes are likely to result in temperature increases in fish
7 habitats within the North Creek Protection Area, thereby irreparably degrading the viability
8 for salmon species to spawn or thrive in the NCWCHPA tributaries. The Board finds
9 Petitioners' arguments persuasive.
10

11 12 *Forest Cover*

13 Even though City staff reports noted that "[p]reservation of forest cover is arguably
14 the single most important component of the fish and wildlife preservations efforts and, thus,
15 should be a high priority for retention,"⁵⁵ the Ordinance further reduces forest cover
16 regulations for the Fitzgerald and Canyon Creek subareas by (1) decreasing the forest
17 cover from 60% to 50% for lands zoned R9,600 (LID) and R 40,000(LID), and from 50% to
18 40% for lands zoned R5,4000 (LID), and (2) redefining the kind and quality of vegetation
19 which amounts to forest cover.⁵⁶ The City's action is based, apparently, on the Council's
20 "finding" that the LID Overlay regulations are "thwarting the level of development anticipated
21 within the Comp Plan"⁵⁷ such that lower standards are appropriate and "strike a proper
22 balance."⁵⁸ The City repeatedly asserts it is required to meet its Growth Management Act
23 (GMA) population target obligations and "cannot promulgate regulations that thwart
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27 ⁵³ Exhibit A to Ordinance 2163 at 2; Petitioners' Prehearing Brief at 3, 17-19.

28 ⁵⁴ Ex. 84, "BAS Report" (October 7, 2004); Ex. 74: "Parametrix Study"; Ex. 35: Public Comment Letter of
29 Suzanne Burnell, Licensed Geologist and Hydrogeologist (November 18, 2014); Ex. 70: Public Comment
30 Letter of David E. Bain, PhD Biology (October 21, 2014); Ex. 101: *Land Use Planning for Salmon, Steelhead,
and Trout*, Washington Dept. of Fish and Wildlife (October 2009); Ex. 103: Ch. 4: *Chinook Conservation
Strategy for WRIA 8* (February 5, 2005) at 23-35.

31 ⁵⁵ Ex. 27f: Att-1 at 7.

32 ⁵⁶ Ex. B-3 to Ordinance 2163 at 6-9, 25-29; Petitioners' Prehearing Brief at 17-19.

⁵⁷ Ex. A to Ordinance 2163 at 7-8.

⁵⁸ *Id.* at 11, 15.

1 development.” Contrary its position in defending the more restrictive LID Overlay enacted in
2 2005, the City now joins development interests in attempting to define a minimum dwelling
3 unit yield/lot or acre.⁵⁹ In *Fuhriman II*, the petitioners argued that the City must base its
4 zoning on an approximate lot yield rather than on a minimum lot size.⁶⁰ The Board
5 disagreed and further noted that appropriate land use designations are viewed in an area-
6 wide context, not a parcel-specific one in which *de minimus* variations will occur.⁶¹
7 Particularly in sensitive areas where restrictions necessary to protect ecosystems limit the
8 net buildable area of a lot, guaranteeing a minimum dwelling unit yield is likely infeasible.
9

10 While the Board agrees that GMA requires cities to meet their growth targets, the
11 City’s Comp Plan⁶² and testimony at the hearing on the merits indicate Bothell is doing so.
12 Further, RCW 36.70A.172 requires that best available science be used:

13 (1) In designating and **protecting** critical areas” and in “developing policies
14 and development regulations to protect the functions and values of critical
15 areas. In addition, counties and cities shall give special consideration to
16 conservation or protection measures necessary to preserve or enhance
17 anadromous fisheries.

18 The Board is aware of no statutory authority to supporting the City’s theory that
19 “balancing” protection of critical areas with the City’s achievement of anticipated
20 development is within its discretion. Instead, the GMA prescribes a consideration of multiple
21 goals and directs cities and counties to **simultaneously** accommodate growth and protect
22 critical areas. The Board finds the City’s assertion that GMA provisions for accommodating
23 growth trump the GMA provisions for protecting critical areas is clearly erroneous.
24

25 Retention of forest cover is “arguably the single most important component” of fish
26 recovery efforts, according to City staff.⁶³ Forest cover includes not just the forest canopy,
27 but also the understory plants (such as vine maples and ferns) and the “duff” that acts to
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30 ⁵⁹ City’s Prehearing Brief at 6; Exhibit B-2 to Ordinance 2163 at Fi-6-7 (Findings 7, 8, 10, and 11); Exhibit A to
Ordinance 2163 at 9.

31 ⁶⁰ *Fuhriman II*, 05325c, Final Decision and Order (August 29, 2005) at 20-21.

32 ⁶¹ *Fuhriman II*, 05325c, Final Decision and Order (August 29, 2005) at 32.

⁶² See Bothell Comprehensive Plan, Land Use Element, Table LU-13 (last amended 2010) at LU-19.

⁶³ Ex. 27f: Att-1 at 7.

1 filter water before it reaches shallow aquifers. The canopy certainly plays a significant role in
2 keeping the ground cool, but the other components play important roles in protecting
3 riparian habitat by reducing runoff containing fine sediments and pollutants. **NE-P31**⁶⁴ calls
4 for preservation of trees, but arguably only within designated critical areas and buffers. The
5 Ordinance 2163 remedy of tree planting or replacement does not replicate the functions of
6 mature and diverse forest cover.
7

8 As noted in Bothell's BAS Report:

9 Salmon require suitable substrate, water quality, cover/shelter, food, riparian
10 vegetation, space and safe passage conditions to survive and thrive. . . .
11 Since the finding notes that urban development and land clearing that
12 typically comes with it have cumulative impacts on waterbodies downstream
13 that **cannot be addressed strictly within the typical scope of critical area**
14 **regulations, this paper briefly discusses other issues that must be**
15 **addressed** These include low-impact approaches to stormwater
16 management; protection of seeps and shallow aquifers that are important
17 perennial sources of cool, clean water to both North Creek . . . cluster of
18 development to **preserve forest cover**; and habitat restoration projects."⁶⁵

19 While Bothell's Natural Element policies are broadly worded, the intent is clear. For
20 example:

21 **NE-P8**⁶⁶ requires that the City protect, restore, and create cold water resources in the
22 Sammamish River, North Creek, and their tributaries, as well as reducing runoff and fine
23 sediments.

24 ⁶⁴ **NE-P31** reads, "Preserve trees within streams, wetlands and their associated buffers."

25 ⁶⁵ Ex. 84, "Bothell BAS Report," *City of Bothell Streams and Riparian Areas: Best Available Science* (October
26 7, 2004) at 1. (emphasis added)

27 ⁶⁶ **NE-P8** reads, in relevant part:

28 Preserve, protect, restore and enhance the Sammamish River and North Creek and their tributaries as
29 fish and wildlife habitat by implementing ... the following special objectives:

30 For the Sammamish River:

- 31 • Protect, restore and create cold water resources in the Sammamish River and
32 its tributaries.

For North Creek and its tributaries:

- Protect and restore a more natural hydrologic regime.
- Reduce runoff and fine sediments.
- Reduce accelerated streambank erosion.

1 **NE-P33** Encourage environmentally sensitive site design that respects existing
2 topography, sensitive lands and critical areas, provides for **retention of native**
3 **vegetation**, ... and **minimizes impervious surface coverage**. . . .⁶⁷

4 **NE-P38** Preserve the special ecological functions of hillsides by developing
5 design and construction standards that **help protect hillside ecological**
6 **functions such as groundwater recharge, natural drainage courses, soil**
7 **retention, and wildlife habitat and corridors**.

8 Petitioners assert that “forest cover of less than 65% and impervious surface cover
9 greater than 5-10%, results in stream degradation.”⁶⁸ The City discounts the applicability of
10 Petitioners’ source, stating that (1) it is a rule of thumb designed for use over an entire
11 watershed; (2) much of the North Creek watershed is outside the City’s limits; and that (3)
12 GMA requires cities to balance environmental goals with “other important GMA goals.”⁶⁹

13 The Parametrix Study states:

14 Although **degradation to stream ecosystems** occurs at low levels of
15 watershed development and has a variety response as development
16 increases, it is **generally** shown that **there are two thresholds for impacts**
17 (Booth et al 2002) (Schueler 1994; Henshaw and Booth 2000):

- 18 • When the sub-basin has **approximately 10 percent effective**
19 **impervious cover**; and
- 20 • When the peak runoff rate from a 10-year forested condition equals
21 the 2-year developed peak flow rate (this is estimated to occur **at 65 percent**
22 **forest cover**).⁷⁰

23 The City also contends that its amendments to the LID Overlay do not amend or
24 lessen the City’s critical area regulations in any manner,⁷¹ but the assertion misses the
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- 27 • Maintain and restore a more natural temperature regime.
 - 28 • Protect and restore riparian habitats.
 - 29 • Reduce nutrient and chemical pollutant loading and reduce impacts on salmon.

30 ⁶⁷ Petitioners’ Prehearing Brief at 19.

31 ⁶⁸ Petitioners’ Prehearing Brief at 10 (citing Exhibit 101 *Land Use Planning for Salmon, Steelhead and Trout*,
Dept. of Fish and Wildlife (October 2009) at 39-40.

32 ⁶⁹ City’s Prehearing Brief at 24-25.

⁷⁰ Ex. 74: “Parametrix Study” (October 2006) at 3-17. (emphasis added).

⁷¹ Exhibit A to Ordinance 2163 at 14.

1 larger point. As will be discussed further below,⁷² in adopting Ordinance 2163, the City
2 moves toward applying development restrictions only to designated critical areas at the
3 expense of protecting the functions and values of the larger ecosystem necessary to
4 support anadromous fisheries. Particularly troubling is the Council's finding that the LID
5 Overlay land use regulations are not critical area regulation and therefore, not required to
6 consider best available science.⁷³ To the extent that the purpose of the LID Overlay is "to
7 protect the complex functions of the critical areas"⁷⁴ RCW 36.70A.172, supra, is clear that
8 the City is required to consider best available science, and with respect to forest cover
9 effectiveness, the City relies on no science, merely conjecture. In this context, Petitioners
10 have met their burden of proof.
11

12 *Effective Impervious Area*

13 Ordinance 2163 eliminates *all* Effective Impervious Area regulations.⁷⁵ **NE-P13**,
14 supra, **NE-P8**, supra, **NE-P23**,⁷⁶ **NE-P33**,⁷⁷ and **NE-P38**⁷⁸ require the City to protect
15 groundwater recharge areas, exactly the reason for limiting impervious surfaces. One of the
16 unique features of the North Creek Protection Area is the presence of myriad shallow
17 aquifers which protect water temperatures and thus supply cooler (than surface) water to
18 help maintain water temperatures within a range that supports anadromous fisheries.⁷⁹
19 These aquifers are fed by infiltration, a process which is disrupted if impervious surface
20 covers the land above the aquifer.
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26 ⁷² See discussion C analyzing consistency between the subarea regulations within the North Creek Protection
27 Area and Bothell's protection of critical areas.

28 ⁷³ Exhibit A to Ordinance 2163 at 15.

29 ⁷⁴ City's Prehearing Brief at 5.

30 ⁷⁵ Exhibit B-3 to Ordinance 2163: Proposed Code Amendments at 3-6.

31 ⁷⁶ Petitioner's Prehearing Brief at 19 (cited as NE NE-P22). **NE-P23** reads, "Protect groundwater recharge
32 areas that benefit anadromous fisheries"

⁷⁷ **NE-P33** reads, in relevant part, "Encourage environmentally sensitive site design that respects ... sensitive
lands . . . and minimizes impervious surface coverage"

⁷⁸ **NE-P38** reads, in relevant part, "[H]elp protect hillside ecological functions such as groundwater
recharge...."

⁷⁹ Ex. 74, Parametrix Study (October 2006) at 2-19, 2-20.

1 The City's response is that it compensated for the removal of the mandatory Effective
2 Impervious Area caps by early adoption and mandatory application of the new 2012
3 Department of Ecology Stormwater Management Manual for Western Washington ("2012
4 Manual"), in recognition of its significant advancements in LID stormwater management
5 technology and its LID BMPs."⁸⁰ For example, **NE-P13** reads:

6 Require "fish sensitive" site design, construction and maintenance practices
7 throughout the city that incorporate best management practices (BMPs). . . .
8 "Fish sensitive" best management practices are specific construction and
9 maintenance methods, practices, and techniques that have been shown to
10 have minimal impact on fish habitat.

11 The Board notes that normally land use standards and regulations such as lot size
12 limits, vegetation retention, critical area buffers, etc. come before Best Management
13 Practices (BMPs). Then BMPs define "how" construction and maintenance is to be done
14 (e.g., covering the pile of fill dirt so it doesn't wash out or blow away, installing drip irrigation
15 for landscaping, outward sloping of semi-pervious sidewalks, etc.). Different agencies
16 define BMPs for specific purposes (e.g., preventing polluting run-off from construction sites -
17 Ecology's Stormwater Manual has BMPs in Volumes III and IV.) Petitioners refer to the LID
18 Overlay regulations amended by the challenged Ordinance as BMPs.⁸¹ The City responds
19 that it is *substituting* stormwater BMPs for more specific fish-sensitive development
20 restrictions.⁸²
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25 ⁸⁰ By Ordinance 2163, the City makes the 2012 Manual mandatory in the LID Overlay District. The 2012
26 Manual, Volume II, sets minimum requirements for stormwater site plans, construction stormwater
27 management, pollution source control, flow control, and the like. Incorporated by reference are Best
28 Management Practices (BMPs) from Volumes III and V. Under Ecology's Western Washington Phase II
29 Municipal Stormwater Permit, all cities must implement the 2012 Manual minimum requirements for controlling
runoff from new development, including requiring LID techniques in their development codes by December 31,
2016; Bothell's Prehearing Brief, at 11.

30 ⁸¹ Petitioners Prehearing Brief at 3.

31 ⁸² City's Prehearing Brief at 22-23; Exhibit A to Ordinance at 2; Bothell Prehearing Brief at 11; Testimony at
32 hearing on the merits; Ex. 48, Director's response letter to Muckleshoot Indian Tribe Fisheries Division SEPA
DNS comment (November 7, 2014) at 3 (citing to NOAA Fisheries Service fact sheet on stormwater and
salmon health (Spring 2012)); Director's response letter to Agaard letter objecting to DNS (November 7,
2014) at 2-3,7.

1 The provisions of the 2012 Manual most applicable to the question of impervious
2 surface caps are set forth in Section 2.2.5 Minimum Requirement #5: *On-Site Stormwater*
3 *Management*.⁸³ The section ends with a warning that land development “cause[s] gross
4 disruption of the natural hydrologic cycle with severe impacts to water and water-related
5 natural resources,” and concludes:

6 The BMPS . . . are likely insufficient by themselves to prevent significant
7 hydrologic disruptions and impacts to streams and their natural resources.
8 Therefore, **local governments should look for opportunities to change**
9 **their local development codes to minimize impervious surfaces** and
10 retain native vegetation in all development situations.⁸⁴

11 Further, City staff noted that, even with the adoption of the 2012 Manual, elimination
12 of Effective Impervious Area restrictions could only be justified if the City requires relatively
13 high forest cover retention,⁸⁵ yet the Ordinance reduces forest retention regulations. Further,
14 City staff included retaining (1) **existing** tree cover, (2) understory plants, (3) the ground
15 surface organic layer or “duff,” and (4) the natural soil horizon in describing the components
16 of “retention of forest cover.”⁸⁶ The Board fails to see how removing Effective Impervious
17 Area caps is consistent with meaningful retention of existing tree cover (trees need water on
18 their root systems), understory plants (which don’t grow on impervious surfaces, or the “duff”
19 (which is of no benefit for filtration if it is under an impervious surface). As with forest cover
20 regulations, the City explains that the need to modify Effective Impervious Area regulations
21 was driven by complaints that it was a significant barrier to development in the area.⁸⁷ The
22 City also asserts that Petitioners have not shown that the Parametrix Study concluded that
23 hydrologic cycle can be protected if “impervious surface is limited **or** stormwater
24 management, including infiltration system, limit the surface runoff to levels that do not result
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30 ⁸³ Exhibit 99, p. 2-28: “Projects shall employ On-Site Stormwater Management BMPs ... to infiltrate, disperse,
and retain stormwater runoff on-site to the extent feasible without causing flooding or erosion impacts.”

31 ⁸⁴ Ex. 99, p. 2-32. (emphasis added)

32 ⁸⁵ Ex. 27f, ATT-1 at 6.

⁸⁶ *Id* at 7.

⁸⁷ City’s Prehearing Brief at 26.

1 in erosion and destabilization of stream channels.”⁸⁸ Reviewing the Parametrix citation, the
2 Board notes that full quote is:

3 Development of any density may avoid adverse effects on water resources
4 only if:

- 5 • Vegetation cover is maintained that preserves the natural functions of
- 6 evapotranspiration and infiltration. This generally means maintenance of
- 7 extensive areas that function as does native forest cover.
- 8 • The amount of impervious surface is limited **or** stormwater
- 9 management, including infiltration system, limit the surface runoff to levels
- that do not result in erosion and destabilization of stream channels⁸⁹.

10 Far from supporting the City’s contention, the Parametrix Study emphasizes that
11 natural forest cover and Effective Impervious Area standards must work in tandem to
12 prevent degradation of crucial ecosystems. After reviewing the 2012 Manual, the Board
13 determines its provisions are not a substitute for impervious surface limitations in a City’s
14 land use code.⁹⁰

16 *Excavation standards*

17 A soil horizon as used in the City staff description of forest retention, refers to soil
18 layers generally parallel to the surface and speaks more to limits on excavation. Logically,
19 the threat excavation poses to anadromous fisheries is twofold: (1) disruption of the duff and
20 soil horizon impedes the filtration function that protects water quality by removing pollutants
21 and increases runoff; and (2) disruption of natural water courses and the shallow aquifers
22 necessarily impairs the flow of cooling, unpolluted water into the North Creek tributaries.

23 **NE-P23**⁹¹ and **NE-P26**⁹² call for the protection of groundwater to provide sufficient,
24 high quality, cooling water to the Sammamish River and its tributaries. **NE-P26** calls
25 explicitly for limitations on excavation, grading, cuts and fills:

28
29 ⁸⁸ Petitioners’ Prehearing Brief at 26.

30 ⁸⁹ Ex. 74: “Parametrix Study” (October 2006) at 2-45.

31 ⁹⁰ Ex. 99: *Stormwater Management Manual for Western Washington*, Vol. I, Ch. 2: “Minimum Requirements for
New Development,” p. 2-32.

32 ⁹¹ **NE-P23** (cited in Petitioners’ PHB at 19 as NE-P22) reads, “Protect groundwater recharge areas that benefit
anadromous fisheries through the critical areas regulations.”

⁹² **NE-P26** reads:

1 Protect the quantity and quality of cool groundwater supplying the
2 Sammamish River and North Creek and its tributaries. Require development
3 potentially affecting natural groundwater flows to follow existing topography;
4 **minimize changes in grade, cleared area and volume of cuts and fills;**
5 **and minimize potential for blockages from foundations, retaining walls**
6 **and rockeries.** (emphasis added)

7 Dr. Suzanne Burnell provided the City with analysis of the importance of protecting
8 the shallow aquifer from disruptions caused by development. Ordinance 2163, she testified,
9 “by deleting and softening key language in the code relating to . . . impervious surfaces and
10 what is allowed for site grading, [has] gravely weakened the environmental protection in the
11 Fitzgerald Subarea.”⁹³

12 Ordinance 2163 amends development regulations in the Fitzgerald and Canyon
13 Creek Subareas by eliminating the requirement the “excavation shall be prohibited from
14 intruding into that part of the groundwater table which experiences saturated soil conditions,
15 as measured during the dry season.”⁹⁴ The Ordinance also loosens restrictions on grade
16 changes. The Board finds that the unique system of seeps and groundwater influence that
17 cools the North Creek tributaries and makes them hospitable to salmon is put at risk by
18 these provisions of the Ordinance.
19

20 *Upstream degradation*

21 The City also notes that the Sammamish River originates in Everett and complains
22 that some pollutant load and water quality degradation exist before the water reaches the
23 Bothell city limits.⁹⁵ While this may be true, the Board is not persuaded that it relieves the
24 City of its obligation to protect the critical ecosystems within its borders. A more appropriate
25 response is outlined in the City’s **NE-P15**, which reads, in its entirety:
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29 Protect the quantity and quality of cool groundwater supplying the Sammamish River and North Creek
30 and its tributaries. Require development potentially affecting natural groundwater flows to follow
31 existing topography; minimize changes in grade, cleared area and volume of cuts and fills; and
32 minimize potential for blockages from foundations, retaining walls and rockeries.

⁹³ Ex. 85 at 5.

⁹⁴ Ex. B-3 (strike-through) to Ordinance 2163 at 9-11, 29-30.

⁹⁵ E.g., City’s Prehearing Brief at 2, n. 4; City’s testimony at hearing on the merits.

1 Participate in Sammamish River watershed and other local and regional
2 efforts to enhance or restore the Sammamish River and North Creek
3 ecosystems to improve habitat conditions for fish and wildlife.

4 Similarly, WAC 365-196-830(7) suggests, in relevant part:

5 . . . When impacts to critical areas are from development beyond
6 jurisdictional control, counties and cities are encouraged to use regional
7 approaches to protect functions and values. It is especially important to use a
8 regional approach when giving special consideration to conservation or
9 protection measures necessary to preserve or enhance anadromous
10 fisheries.

11 *Bothell Connector*

12 In addition to amending development regulations in the North Creek Preservation
13 Area, the City in Ordinance 2163 reassigned the location of the Bothell Connector, a
14 planned north-south road linking 240th Street SE with 228th Street SE. Rather than a direct
15 five-lane arterial along the 39th Avenue alignment, the ordinance adopted a three-lane jog
16 to a 35th Avenue alignment. The new proposal reduces environmental impact as well as
17 reducing costs to developers.⁹⁶ Petitioners raised no objection to the relocation of the
18 Bothell Connector in their briefs or argument. To the extent Legal Issues 1, 2, 3, and 5
19 reference transportation goals and policies, their challenge to Ordinance 2163 provisions
20 concerning the Bothell Connector have been abandoned and are dismissed.
21

22 *Conclusion*

23 RCW 36.70A.130(d) requires that “[a]ny amendment of or revision to development
24 regulations shall be consistent with *and implement* the comprehensive plan.” WAC 365-
25 196-500 (3) provides, similarly, that “development regulations must be internally consistent
26 and be consistent with and implement the comprehensive plan.” In analyzing whether there
27 is a lack of consistency between a plan provision and a development regulation, the Board
28 determines whether development regulations implement comprehensive plan goals and
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⁹⁶ City's Prehearing Brief at 7-8; Ex. 27a at 1-6; Ex. 3.a at 3-7.]

1 policies or preclude achievement of any of the Comprehensive Plan policies.⁹⁷ Here, blanket
2 removal of Effective Impervious Area development restrictions fails to ensure recharge of
3 shallow aquifers as required by the Comp Plan. Lowering and redefining forest cover
4 requirements undermines “the single most important element of the fish and wildlife
5 preservation efforts.”⁹⁸ Opening the area to excavation and grade changes disrupts the
6 sensitive natural hydrology which makes the area uniquely valuable for salmon. The City’s
7 early adoption of the Manual and its application to the Fitzgerald and Canyon Creek
8 Subareas simply addresses conditions common to Western Washington; there is no
9 evidence that the special hydrology of the subarea will be protected or that the conditions
10 necessary for salmon spawning will be preserved.
11

12 The City’s substitution of provisions of the 2012 Manual for the prior impervious
13 surface limitations, forest cover standards (including a higher cap on nonnative trees), and
14 excavation into groundwater restrictions in the LID Overlay for the Fitzgerald and Canyon
15 Creek Subareas is inconsistent with and fails to implement Comprehensive Plan policies
16 **NE-P13, NE-P23, NE-P33, and NE-P38** in violation of RCW 36.70A.130(d). The Board is
17 left with a firm and definite conviction that a mistake has been made. Bothell’s adoption of
18 Ordinance 2163 is clearly erroneous in view of the entire record before the Board and in
19 light of the goals and requirements of the GMA.
20
21

22 **B. Did the City fail to provide proper public notice and participation in violation of**
23 **RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.130(2), and RCW 36.70A.140?**
24 **(Issue 7⁹⁹)**

25 Petitioners’ prehearing brief contains only a few lines, in the Conclusion section,
26 concerning process flaws, alleging the City’s code and plan amendments were “procedurally
27 inadequate under RCW 36.70A.140, which requires early and continuous public
28

29
30 ⁹⁷ *Peranzi v. City Of Olympia*, WWGMHB Case No. 11-2-011. Final Decision and Order (May 04, 2012), at 26-27.

31 ⁹⁸ Ex. 13A: ATT-1, Agenda Staff Report to Council (July 8, 2014) at 7.

32 ⁹⁹ Did the City fail to comply with the Growth Management Act because Respondent failed to provide proper public notice and participation in violation of RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.130(2), and RCW 36.70A.140?

1 participation” because “the City only sought early and continuous participation from
2 developers.”¹⁰⁰ Petitioners failed to explain how RCW 36.70A.140 was violated under the
3 facts before the Board and failed to present any legal argument on this issue beyond
4 making conclusory statements.

5 WAC 242-03-590(1) provides that “[f]ailure . . . to brief an issue shall constitute
6 abandonment of the unbriefed issue.” “An issue is briefed when legal argument is provided;
7 it is not sufficient for a petitioner to make conclusory statements, without explaining how, as
8 the law applies to the facts before the Board, a local government has failed to comply with
9 the Act.”¹⁰¹

10
11 In the case before us, the City planning staff was approached by Fitzgerald subarea
12 property owners frustrated over difficulties in developing their land. The City then
13 interviewed several developers and began considering amendments to the LID Overlay in
14 response to their suggestions.¹⁰² A number of public meetings were convened, a City
15 Council Study Session in July 2014,¹⁰³ and three public hearings on draft proposals in
16 September, October, and November, before adoption of the Ordinance November 18, 2014.
17 Petitioners provide no argument supporting their assertion this process was inadequate or
18 violated any of the cited provisions of the Growth Management Act. The Board decides the
19 Petitioners abandoned the issue of inadequate public process.
20

21 Legal Issue 7 is dismissed.
22

23 **C. Does Ordinance 2163 fail to ensure that the fish and wildlife in forested and**
24 **riparian areas will be protected such that Ordinance 2163 is inconsistent with**
25 **Bothell’s Critical Areas Ordinance, RCW 36.70A.172(1), and RCW 36.70A.130(1)(d)?**
26 **(Issue 8)**
27
28

29 ¹⁰⁰ Petitioners’ Prehearing Brief at 26.

30 ¹⁰¹ *Tulalip Tribes of Washington v. Snohomish County*, Case No. 96-3-0029, Final Decision and Order (Jan. 8,
1997), at 7, n. 1.

31 ¹⁰² Ex. 13b, 1/8/14 Memorandum by Bill Wiselogle, Community Development Director, and Bruce Blackburn,
32 Senior Planner, *re Developer Interviews Conducted in Response to Property Owners’ Concerns re Effects of Current Regulations*.

¹⁰³ Ex. 13A: ATT-1, Agenda Staff Report to Council (July 8, 2014).

1 Petitioners raise concerns that Ordinance 2163 has removed or loosened pre-
2 existing LID regulations relating to (1) impervious surface maximums, (2) forest cover
3 retention standards, and (3) standards for excavation into groundwater and wildlife
4 corridors, which are necessary to protect Critical Areas within the North Creek Protection
5 Area, and did so without consulting scientific studies in the record.¹⁰⁴ Petitioners also
6 contend the amendments to the LID Overlay regulations failed to give special consideration
7 to protection measures that preserve or enhance anadromous fisheries.¹⁰⁵ The Board
8 agrees and finds Petitioner's concerns are well taken.
9

10 The Growth Management Act requires all cities and counties to include the Best
11 Available Science to: (1) designate Critical Areas,¹⁰⁶ and (2) adopt development regulations
12 that **protect** the "**functions and values**" of Critical Areas.¹⁰⁷ "**Special consideration**" must
13 be given to protection measures that preserve or enhance **anadromous fisheries**. Bothell's
14 Critical Areas Ordinance (CAO) states that "decisions to alter critical areas shall rely on the
15 best available science to protect the functions and values of critical areas and must give
16 special consideration to conservation or protection measures necessary to preserve or
17 enhance anadromous fish, such as salmon and bull trout, and their habitat."¹⁰⁸
18

19 Under the statutory definition of "Critical Areas," counties and cities must protect
20 "**areas and ecosystems**."¹⁰⁹ Development regulations may not allow a **net loss of the**
21 **functions and values of the ecosystem** that includes the impacted or lost critical areas.¹¹⁰
22 Some critical areas, such as wetlands and fish and wildlife habitat conservation areas, may
23

24 ¹⁰⁴ Petitioners' Prehearing Brief, pp. 3-4, 12 (April 27, 2015).

25 ¹⁰⁵ *Id.* at 13-14.

26 ¹⁰⁶ RCW 36.70A.170.

27 ¹⁰⁷ RCW 36.70A.172(1) "In designating and protecting critical . . . cities . . . protect the functions and values of
28 critical areas. . . [C]ities shall give special consideration to . . . protection measures necessary to preserve or
29 enhance anadromous fisheries." See also WAC 365-196-830(3) "'Protection' in this context means
30 preservation of the functions and values of the natural environment. . . ." RCW 36.70A.060(2). [Emphasis
31 added]

32 ¹⁰⁸ BMC 14.04.100.

¹⁰⁹ RCW 36.70A.030(5) "'Critical areas' include the following areas and ecosystems: (a) Wetlands; (b) areas
with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation
areas"

¹¹⁰ WAC 365-196-830(4) ". . . Development regulations may not allow a net loss of the functions and values of
the ecosystem that includes the impacted or lost critical areas."

1 constitute ecosystems or parts of ecosystems that transcend the boundaries of individual
2 parcels and jurisdictions, so that protection of their function and values should be
3 considered on a larger scale.¹¹¹ Bothell's CAO states "No activity or use shall be allowed
4 that results in a net loss of the functions or values of critical areas."¹¹²

5 In the Best Available Science study prepared for Bothell's CAO in 2004, Steward and
6 Associates¹¹³ stated that urban development typically creates impacts on waterbodies
7 downstream "that cannot be addressed strictly within the typical scope of critical area
8 regulations." The report went on to discuss "other issues that must be addressed
9 These include low-impact approaches to storm water management; protection of seeps and
10 shallow aquifers that are important perennial sources of cool, clean water to both North
11 Creek; . . . cluster of development to preserve forest cover; and habitat restoration projects."

12 Bothell's purpose for regulation of uses for protection of groundwater resources, BMC
13 12.50.030 (Canyon Creek Subarea) and BMC 12.52.030 (Fitzgerald subarea) reads:

14 The [North Creek Protection Area] [LID Overlay] is assigned to specific
15 lands within the [Subarea] as a special regulation to protect the known
16 critical fish and wildlife habitat and the conditions that support the habitat
17 present in this subarea through low impact development (LID) and other
18 regulations. This chapter augments and amends other development codes
19 by establishing regulations for the maintenance and restoration of the
20 hydrologic cycle, particularly as it affects protection of surface and
21 groundwater resources specifically within the Palm, Woods, Cole and
22 North Creek drainage basins. This land use section shall be used in
23 conjunction with the LID requirements established within the Bothell Design
24 and Construction Standards and Specifications (Bothell Standards).

25 (emphasis added)

26
27
28 ¹¹¹ WAC 365-196-830(6) reads:

29 Functions and values must be evaluated at a scale appropriate to the function being evaluated.

30 Functions are the conditions and processes that support the ecosystem. **Conditions and processes**
31 **operate on varying geographic scales ... even regional scales.** Some critical areas, such as
32 wetlands and fish and wildlife habitat conservation areas, may constitute ecosystems or parts of
ecosystems that transcend the boundaries of individual parcels and jurisdictions, so that protection of
their function, and values should be considered on a larger scale. (emphasis added)

¹¹² BMC 14.04.090.

¹¹³ Ex. 84, at 1.

1 Thus the Bothell BAS Report compiled for its Critical Areas Ordinance indicates
2 additional measures are required in the Fitzgerald and Canyon Creek Subareas to protect
3 the hydrologic cycle and to ensure no net loss of ecosystem functions and values. The
4 Parametrix Study¹¹⁴ sounds a similar theme:

5 In summary, **maintaining the hydrologic cycle is key to maintaining the**
6 **function of streams and the web of aquatic organisms that depend**
7 **upon them.** Development of any density may avoid adverse effects on water
8 resources only if:

- 9 • Vegetation cover is maintained that preserves the natural functions of
10 evapotranspiration and infiltration. **This generally means maintenance**
11 **of extensive areas that function as does native forest cover.**
- 12 • **The amount of impervious surface is limited,** or stormwater
13 management, including infiltration system, limit the surface runoff to
14 levels that do not result in erosion and destabilization of stream
15 channels.

16 This is consistent with the guidance in WAC 365-196. In the present case, the
17 hydrologic integrity of the North Creek Protection Area is key to its function and value of
18 providing viable salmon habitat.

19 Ordinance 2163 amended Bothell's Comprehensive Plan to reduce or eliminate
20 protections for Critical Areas in the Fitzgerald and Canyon Creek Subareas by repealing
21 limitations on impervious surface coverage (as a percentage of site area) and by reducing
22 the percentage of retained forest cover.¹¹⁵ The forest cover retention requirements were
23 further weakened by eliminating the requirement for permanence. The action eliminated
24 comparable ecosystem protections in Bothell's Development Regulations and also reduced
25 the protection of forest cover ecosystem functions by doubling the percentage cap on
26 nonnative trees.¹¹⁶

27 Ordinance 2163 also amended Bothell's Comprehensive Plan to eliminate
28 protections for Critical Areas in the Fitzgerald and Canyon Creek subareas by repealing
29

30
31 ¹¹⁴ Ex. 74: "Parametrix Study" (October 2006) pages 2-26, 2-29, 2-33, 2-45; Ex. 74 (April 27, 2015) [Emphasis
32 added; internal citations omitted].

¹¹⁵ Ex. B-2, p. FI-8.

¹¹⁶ Ex. B-3, p. 17.

1 prohibitions on excavation intrusions “into that part of the groundwater table which
2 experiences saturated soil conditions, as measured during the dry season.”

3 The City claims these LID Overlay plan and code amendments are not part of the
4 Critical Areas Ordinance and do not affect the CAO. Such a semantic distinction makes no
5 difference because it is clear these LID Overlay amendments will significantly weaken
6 ecosystem protections for actual Critical Areas in the Fitzgerald/35th SE Subarea.
7

8 Petitioners have demonstrated that the amendments to the Fitzgerald and Canyon
9 Creek subareas LID Overlay enacted with Ordinance 2163 reduce or eliminate protections
10 of Critical Areas, resulting in a net loss of ecosystem functions and values regardless of
11 whether as a technical matter the CAO itself is being amended. Thus, Ordinance 2163
12 violates RCW 36.70A.172(1), RCW 36.70A.130(1)(d), and contravenes Bothell’s Critical
13 Areas Ordinance and frustrates the CAO purposes and policies. Petitioners have also
14 demonstrated that amendments to the LID Overlay regulations failed to give special
15 consideration to protection measures that preserve or enhance anadromous fisheries in
16 contrary to RCW 36.70A.172(1) and BMC 14.04.090 .
17

18 The Board has the firm and definite conviction that a mistake has been made.
19 Ordinance 2163 is clearly erroneous in view of the entire record before the Board and in
20 light of the goals and requirements of the GMA.
21

22 **D. Was the SEPA DNS Erroneous (Issue 9¹¹⁷)**

23 Petitioners allege the City’s Determination of Nonsignificance (DNS) was erroneous.
24 The Board does not reach the merits of the matter but dismisses Legal Issue 9 due to
25 Petitioners’ failure to exhaust available SEPA administrative remedies.
26
27

28 ¹¹⁷ Did the City fail to comply with SEPA by erroneously issuing a Determination of Non Significance (DNS) for
29 the Ordinance, Proposed Plan Amendments and Proposed Code Amendments; both misapplying and omitting
30 particular sections of an October 2006 Parametrix report entitled *North Creek Fish and Wildlife Critical Habitat*
31 *Protection Area (NCFWCHPA) Study* and Respondent’s 2006 Final Environmental Impact Statement for the
32 now abandoned Bothell Connector Project; failing to address the present impacts to the transportation
corridor, current transportation conditions, and the significant adverse impacts to the environmental, wildlife,
land use and development, which requires the preparation of a new or amended Environmental Impact
Statement in violation of RCW 43.21C.030(c), and WAC 197-11-600(3)(b)(ii)?

1 In response to Board questions at the hearing on the merits, the petitioners
2 acknowledged they had not filed an appeal of the DNS to the hearing examiner as provided
3 in Bothell's municipal code. BMC 14.02.250.¹¹⁸ The City, which had not raised this issue in
4 its briefing, promptly urged the Board to dismiss the SEPA challenge for failure to exhaust
5 administrative remedies. Pursuant to WAC 242-03-800, the Board requested that Petitioners
6 and Respondent each submit a supplemental brief addressing whether Petitioners may
7 challenge the Ordinance for failure to comply with RCW 43.21C.030(c)¹¹⁹ or WAC 197-11-
8 600.¹²⁰ Post-hearing briefs were received as follows: Petitioners' Supplemental Brief on
9

10
11
12 ¹¹⁸ **BMC 14.02.250 Administrative appeals.**

13 A. Any person may appeal a threshold determination ... official pursuant to the procedures set forth in
14 this section. No other SEPA appeal shall be allowed.

15 B. All SEPA appeals must be filed in writing with the director . . .

16 2. Within 21 calendar days after the date of issuance of a notice of decision if the responsible
17 official designates a comment period in the threshold decision.

18 The notice of decision shall state the applicable appeal period. All appeals shall contain a
19 statement of reasons why the decision of the responsible official is allegedly in error and comply
20 with the other requirements for a written appeal listed in BMC 11.14.005(D).

21 C. On receipt of a timely notice of appeal and the appeal fee set in BMC 14.02.300, the director shall
22 advise the hearing examiner of the pendency of the appeal and the hearing examiner shall set a date to
23 hear the appeal. . . .

24 ¹¹⁹ **RCW 43.21C.030(c)** provides:

25 Include in every recommendation or report on proposals for legislation and other major actions
26 significantly affecting the quality of the environment, a detailed statement by the responsible official on:

27 (i) the environmental impact of the proposed action;

28 (ii) any adverse environmental effects which cannot be avoided should the proposal be
29 implemented;

30 (iii) alternatives to the proposed action;

31 (iv) the relationship between local short-term uses of the environment and the maintenance and
32 enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the
proposed action should it be implemented;...

¹²⁰ **WAC 197-11-600(3)(b) When to use existing environmental documents**, provides, in relevant part,:

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required
if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse
environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This
includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination
or SEIS is not required if probable significant adverse environmental impacts are covered by the range
of alternatives and impacts analyzed in the existing environmental documents.

(d) Preparation of a SEIS if there are:

1 SEPA Standing and Jurisdiction, Bothell's Post Hearing Brief Regarding Petitioners' Failure
2 to Exhaust Administrative Remedies. The Board also asked the City to provide copies
3 of Exhibits 45 (Aagaard letter), 47 (Muckleshoot letter), and 87 (affidavit of publication for
4 the DNS).

5 Petitioners assert the City failed to raise any objections or defenses to Petitioners'
6 SEPA claims before the deadline for dispositive motions. Petitioners urge the Board to find
7 the defense is waived. The Board disagrees. WAC 242-03-550, which is the basis for the
8 Board's dispositive motion calendar, does not require the responding city or county to raise
9 all its defenses at risk of waiver, and there is no rule in the Board's rules of practice that
10 affirmative defenses or even timeliness, standing, and jurisdiction must be brought by
11 dispositive motion. Certainly standing and jurisdiction can be raised at any time. The City
12 could have raised this defense earlier in the interest of judicial economy. But under the long-
13 standing rule, the Board decides the City's failure to raise the exhaustion argument before
14 the hearing did not waive the defense or preclude the City from raising it at the hearing on
15 the merits.
16

17 Petitioners next argue that case law requires that SEPA exhaustion must be
18 interpreted broadly. The cases cited,¹²¹ however, deal with the scope of a petitioner's
19 comments, not with whether an available administrative review process was bypassed. In
20 the present case, the Petitioners submitted a comment letter during the DNS comment
21 period, sufficiently setting forth their objections.¹²² They did not, however, pursue the
22 administrative appeal available to them by filing notice of appeal and paying the required
23 fee. Bothell's municipal code provides for review by a hearing examiner when an appeal is
24 filed within 21 days after issuance of notice of the decision (here, the DNS), BMC
25 14.02.250(8)(2), and a \$1000 fee is paid, BMC 14.02.300.
26
27
28

29
30 (i) Substantial changes so that the proposal is likely to have significant adverse environmental
31 impacts; ...

32 ¹²¹ *Pacific Coast Federation of Fishermen's Association v. United States Department of Interior*, 929 F. Supp.
2d 1039, 1044 (E.D.Cal. 2013); *Buck v. City of Shoreline*, 2012 Wash. App.LEXIS 789 (Wash. Ct. App. Apr. 2,
2012) unpublished.

¹²² Ex. 45, Aagaard letter

1 The long-standing SEPA requirement to exhaust administrative appeal remedies is
2 found in WAC 197-11-680(3)(c):

3 If an agency provides an administrative appeal procedure, that procedure
4 must be used before anyone may initiate judicial review of any SEPA issue
5 that could have been reviewed under the agency procedures.

6 In *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20,785 P.2d 447 (1990), the
7 Supreme Court explained the requirement for pursuing available administrative procedures.
8 Exhaustion allows the agency to develop the factual background on which to base a
9 decision and to correct its own mistakes: "Had Citizens made a formal appeal, they might
10 have presented facts which would persuade Spokane that the existing statement needed
11 revision, thus obviating the need for litigation." Although the appeal allowed in Spokane's
12 procedure was directly to a City Council which might be presumed to be already decided,
13 the Court said: "It is not unfair to expect citizen groups to use available administrative
14 procedures. Fairness to the agency requires that would-be litigants try to clarify ambiguity
15 before going to court."
16

17 The Growth Board has consistently applied the same rule, requiring the party
18 objecting to the local government's SEPA threshold determination to first use the review
19 process in local regulations as a precondition for challenging the threshold determination
20 before the Board. The Board finds no basis for changing its procedure in this case. The
21 Board decides that Petitioners failed to avail themselves of hearing examiner review and
22 thus did not exhaust their available administrative remedies.
23

24 Legal Issue 9, alleging the City's SEPA DNS was erroneous, is dismissed.
25

26 **E. Did the Ordinance constitute a major and improper change to the City's Comp**
27 **Plan? (Issue 10¹²³)**
28

29 Legal Issue 10 alleges the Ordinance adopts amendments so significant they should
30 have been reserved for consideration as part of the eight-year Comp Plan update required
31

32 ¹²³ Did the City fail to comply with RCW 36.70A.130(4) because the revisions to Ordinance, Proposed Plan
Amendments and Proposed Code Amendments constitute a major and improper change to the City of
Bothell's Imagine Bothell Comprehensive Plan?

1 under RCW 36.70A.130(4)¹²⁴ and due, for Bothell, in 2015. Petitioners' Prehearing Brief
2 makes no mention of RCW 36.70A.130(4) or the 8-year update. The Board determines that
3 Petitioners have abandoned this issue.

4 Legal Issue 10 is dismissed.

5
6 **F. Will the continued validity of the Ordinance, Proposed Plan Amendments and**
7 **Proposed Code Amendments substantially interfere with the fulfillment of the goals**
8 **of the Growth Management Act?**¹²⁵

9 RCW 36.70A.302, the GMA's invalidity provision, provides in part:

10 The board may determine that part or all of a comprehensive plan or
11 development regulation are invalid if the board:

- 12 (a) Makes a finding of noncompliance and issues an order of remand under
13 RCW 36.70A.300;
14 (b) Includes in the final order a determination, supported by findings of fact
15 and conclusions of law, that the continued validity of part or parts of the
16 plan or regulation would substantially interfere with the fulfillment of the
17 goals of this chapter, and
18 (c) Specifies in the final order the particular part or parts of the plan or
19 regulation that are determined to be invalid, and the reasons for their
20 invalidity.

21 A determination of invalidity is based on a finding that continued validity of a City's
22 action "would substantially interfere with the fulfillment" of a GMA Goal. Petitioners here cite
23 to GMA Goals 1 (Urban growth), 3 (Transportation), 9 (Open Space and Recreation), and 10
24 (Environment).¹²⁶ The Board has previously concluded that Petitioners have not carried their
25 burden in demonstrating that the challenged Ordinance will frustrate GMA goals 1, 3, and 9.

26 The Board therefore looks to GMA Planning Goal 10 in RCW 36.70A.020 which
27 requires environmental protection:

28 ¹²⁴ RCW 36.70A.130(4):

29 (4) Except as provided in subsection (6) of this section, counties and cities shall take action to review
30 and, if needed, revise their comprehensive plans and development regulations to ensure the plan and
31 regulations comply with the requirements of this chapter as follows:

32 (a) On or before December 1, 2004, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish,
Thurston, and Whatcom counties and the cities within those counties

¹²⁵ Legal Issue 11. See WAC 242-03-820(3).

¹²⁶ See Legal Issues 2 and 5.

1 (10) Environment. Protect the environment and enhance the state's high
2 quality of life, including air and water quality, and the availability of water.
3 The Board has determined that the City of Bothell's adoption of Ordinance 2163 is
4 noncompliant with RCW 36.70A.130(1)(d) and RCW 36.70A.172. The Board issues an
5 order of remand to the City to achieve compliance under RCW 36.70A.300.

6 The subarea of Bothell subject to Ordinance 2163 is an area of particular
7 environmental significance because of the quality of its surface and groundwater.
8 Subdivision and residential development without appropriate measures to protect the unique
9 hydrology of the area would irreversibly degrade valuable salmon habitat and substantially
10 interfere with the GMA goal of environmental protection.
11

12 IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

13 Findings of Fact

14 Pursuant to RCW 36.70A.302(2) **the Board enters the following findings:**

- 15 1. The North Creek Protection Area is a subarea identified by the City of Bothell in
16 its Comprehensive Plan because of its unique hydrology of seeps and shallow
17 groundwater that provide cool water to the streams and suitable habitat for
18 Chinook salmon.
19
- 20 2. Bothell previously adopted LID Overlay regulations to protect the area.
21
- 22 3. Ordinance 2163 revises the LID Overlay regulations and reduces environmental
23 protection.
24
- 25 4. Retention of forest cover is essential to protection of water quality in the North
26 Creek Protection Area. Ordinance 2163 reduces and redefines the requirement
27 for retention of forest cover.
28
- 29 5. Limitation of impervious surfaces is essential to protection of the hydrology of the
30 North Creek Protection Area. Ordinance 2163 eliminates limits on effective
31 impervious area.
32
6. Minimizing excavation and disturbance of the shallow aquifers is essential to
protecting the cool, clean water source for the area's streams. Ordinance 2163

loosens restrictions on grade changes, cuts and fills, and intrusion into the shallow aquifers.

7. Petitioners presented un rebutted science demonstrating the risk to critical salmon habitat from removal of forest cover, increases in impervious surface, and allowance of excavation and grade changes.
8. The impacts of development under Ordinance 2163 will likely cause irreversible changes to the hydrology of the North Creek Protection Area, degrading water quality and eliminating salmon habitat.
9. The City's adoption of Ordinance 2163 substantially interferes with the GMA goal to protect the environment, including water quality.

Conclusions of Law

The Board concludes the continued validity of Ordinance 2163, particularly the provisions reducing forest cover retention requirements, eliminating impervious surface caps, and allowing increased excavation into groundwater areas, substantially interferes with the fulfillment of GMA Planning Goal 10 in RCW 36.70A.020(10).

The Board remands the Ordinance to the City, establishes a compliance schedule, and enters a determination of invalidity.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board Orders:

1. To the extent Legal Issues 1, 2, 3, and 5 reference the Bothell Connector, Petitioners have abandoned their issue. The portions of these issues are dismissed.
2. Petitioners have failed to meet their burden of proof as to Legal Issue 7 . This issue is dismissed.

3. Petitioners failed to exhaust available administrative remedies prior to challenging the City's DNS and may not raise Legal Issue 9 before the Board. This issue is dismissed.
4. Petitioners abandoned Legal Issue 10. This issue is dismissed.
5. The City's substitution of provisions of the 2012 Manual for the prior impervious surface limitations, forest cover standards (including a higher cap on nonnative trees), and excavation into groundwater restrictions in the LID Overlay for the Fitzgerald and Canyon Creek Subareas is inconsistent with and fails to implement Comprehensive Plan policies **NE-P13, NE-P23, NE-P33, and NE-P38** in violation of RCW 36.70A.130(1)(d).
6. Ordinance 2163 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA in violation of RCW 36.70A .172 and contrary to RCW 36.70A.020(10).
7. The Board enters a determination of invalidity and remands the Ordinance to the City for revision to bring it into compliance with the GMA as set forth in this Order.
8. The Board sets the following schedule for the City's compliance:¹²⁷

Item	Date Due
Compliance Due	January 14, 2016
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	January 28, 2016
Objections to Finding of Compliance	February 11, 2016
Response to Objections	February 22, 2016
Compliance Hearing (Telephonic) Call 1-800-704-9804 and use pin 4472777#	March 8, 2016

¹²⁷ Pursuant to WAC 242-03-910, the City may file a motion requesting an expedited compliance hearing if it has taken action to comply with all or part of the Board's order prior to expiration of the time set for compliance.

1 SO ORDERED this 21st day of July, 2015.

2
3
4

Cheryl Pflug, Board Member

5
6
7

Margaret Pageler, Board Member

8
9
10

Raymond L. Paolella, Board Member

11 **Note: This is a final decision and order of the Growth Management Hearings Board**
12 **issued pursuant to RCW 36.70A.300.¹²⁸**
13
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30 ¹²⁸ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
31 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent
upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings
Board is not authorized to provide legal advice.

Concurrence

Raymond L. Paoella concurs with the majority and writes separately to amplify the analysis on Critical Area Ecosystem Protections as informed by the Best Available Science:

The GMA requires cities and counties to protect the functions and values of Critical Area Ecosystems, and the adopted ecosystem protections shall include the Best Available Science. Special consideration must be given to conservation or protection measures necessary to preserve or enhance anadromous fisheries.¹²⁹

Fish and Wildlife Habitat Conservation Areas serve a critical role in sustaining needed habitats and species for the “*functional integrity of the ecosystem*.”¹³⁰ Development regulations must preserve the existing functions and values of critical areas and may not allow a net loss of the functions and values of the critical area ecosystem.¹³¹ The term “Ecosystem” has been defined in scientific publications as follows¹³²:

An ecosystem consists of all the organisms that live in a particular area along with physical components of the environment with which those organisms interact. There must be an appropriate mixture of plants, animals, and microbes if the ecosystem is to function. Organisms and their physical environment are interconnected by an ongoing flow of energy and nutrient cycling. So complete is the interconnectedness of the various living and nonliving components of the ecosystem that a change in any one will result in a subsequent change in almost all the others. Green plants provide ecosystem services because they enhance the life-supporting attributes of the atmosphere, surface water, soil, and other physical components of an ecosystem. As primary producers, plants benefit many other organisms by producing oxygen, reducing atmospheric carbon, building soil, holding water, moderating climate, and converting energy in sunlight into chemical energy through photosynthesis. Plants provide human societies with food, fibers, building materials, and medicines. Biodiversity is important for maintaining ecosystem functions.¹³³

¹²⁹ RCW 36.70A.030(5), RCW 36.70A.060(2), RCW 36.70A.172(1). Under WAC 365-195-925(2), a county should include “in the record” evidence of special consideration to comply with RCW 36.70A.172(1).

¹³⁰ WAC 365-190-030(6)(a), emphasis added [WAC Chapter 365-190 contains the “minimum guidelines that apply to all jurisdictions,” promulgated pursuant to RCW 36.70A.050(3)].

¹³¹ WAC 365-196-830(4).

¹³² The Supreme Court has held that the Growth Management Hearings Board may consider and use scholarly publications to assist in interpreting undefined legal terms – such interpretive materials are not considered by the Supreme Court to be “evidence.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 433-434 (Wash. 2007).

¹³³ Freeman, Scott, *Biological Science*, 4th Edition, Pearson 2011, pp.547-549 and 1117-1120; Molles, Manuel, *Ecology – Concepts and Applications*, 5th Edition, McGraw Hill 2008, p.8; Kimmins, J.P., *Forest Ecology: A*

Excerpts from the *North Creek Fish and Wildlife Critical Habitat Protection Area Study*¹³⁴ provide Best Available Science for the Fitzgerald/35 SE Subarea and state that maintaining the *hydrologic cycle* is key to maintaining ecosystem functions:

Human development typically has substantial impacts on the hydrologic cycle, generally through the change in vegetation and the addition of impervious surfaces. Both of these activities tend to change the natural patterns of water movement from primarily infiltration, storage in the soil column, and gradual movement and discharge to surface runoff.

The replacement of natural vegetation such as forest, wetland, and riparian areas, with impervious surfaces such as roads, parking lots, buildings, and heavily compacted soils can lead to even greater impacts on stream flows, including alteration of the magnitude and frequency of high flows, and lead to reductions in summer base flows. The alterations in hydrologic regime can also affect the thermal regime of the stream. The reduction of riparian vegetation within developed watersheds can cause elevated maximum stream temperatures, greater daily fluctuations, and reduced winter temperatures.

Numerous studies of Puget Sound lowland streams indicate that stream ecosystems are impacted by development. In general, conversion of forest to pasture or impervious (paved) surface changes the hydrology of a watershed. As shown in Figure 2-8, forest vegetation and native soils can store up to 85 percent of precipitation. This water is either returned to the atmosphere through evapotranspiration, infiltrated to deep groundwater, or slowly released to streams. Replacing forest vegetation and native soils with impervious surfaces and lawns dramatically increases the amount of surface water. As a result the magnitude and frequency of flows in streams increases. This results in increased scour, erosion, and flooding which directly impact stream habitat.

Both physical and biological changes have been measured across a range of watershed land use conditions. In general, both physical and biological attributes of streams correlate with changes in land use and generally *decline* as watershed development increases. Biologic measures may be more sensitive indicators of degradation and indicate some impact even at very low levels of development.

Three key findings from the studies reviewed are:

Foundation for Sustainable Forest Management and Environmental Ethics in Forestry, 3rd Edition, Prentice Hall 2004, pp. 28-29; Starr, Cecie and Taggart, Ralph, *Biology – The Unity and Diversity of Life*, 10th Edition, Thomson 2004, pp. 868-873. See also *WEAN v. Island Co.*, WWGMHB Case No. 14-2-0009 (FDO June 24, 2015).

¹³⁴ *North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA) Study*, pages 2-26, 2-29, 2-33, 2-45 (prepared for City of Bothell by Parametrix, October 2006), attached to Petitioners' Prehearing Brief, Tab 10 Ex. 74 (April 27, 2015) [Emphasis added; internal citations omitted].

- 1) **stream ecosystems are sensitive to very low levels of development, with noticeable effects occurring at 5 percent to 10 percent impervious surface coverage,**
- 2) **stormwater detention ponds do not mitigate development, and**
- 3) **intense urban development can never fully be mitigated. . . .**

Studies indicate that readily observable aquatic-system degradation is noticeable at development levels of around 10 percent effective impervious area, with impacts noticeable at even lower levels of development. Several studies have documented that streams can be degraded by low-density (1du/5ac) rural development, primarily due to conversion of forest cover to lawn or pasture. Low density development with low levels of impervious surface can clear up to 60 percent of native vegetation to create large lawns, pastures, or hobby farms. This level of clearing has been correlated with significant effects on watershed flow regime. An investigation of 22 Puget Sound lowland streams indicates a sharp decline in the biological integrity and habitat conditions of the streams as the total impervious area increased above 5 percent.

Although degradation to stream ecosystems occurs at low levels of watershed development and has a variety response as development increases, it is generally shown that there are two thresholds for impacts:

- When the sub-basin has approximately 10 percent effective impervious cover; and
- When the peak runoff rate from a 10-year forested condition equals the 2-year developed peak flow rate (this is estimated to occur at 65 percent forest cover).

Both physical and biological measures of healthy stream habitat have been used to assess impacts related to development within a watershed. Hammer (1972) and Booth (1989, 1990), as well as numerous other studies, document physical changes in stream morphology related to increased watershed development. Examples of such changes included channel incision (downcutting), bank erosion, and stream widening. In general, impacts increase across a gradient as the level of development in a watershed increases. Changes in morphology indicate reduced channel stability and degraded physical habitat. Higher flows generally lead to changes in channel character, higher stream erosion rates, increases in scour and erosion, sedimentation, and disconnections from the floodplain with resulting **loss** of flood storage. In general, these changes compound each other in an urban environment. In addition, stream channelization, culverts, bank protection and other alteration can *reduce* channel complexity and *eliminate* off-channel refuge habitats.

Instream pools are essential to many species of fish. A variety of pool types is required to provide the range of habitat needed by different species and age classes throughout the year. For example, slow-moving dammed or backwater pools provide areas of reduced velocity used by juveniles while rearing. These pools are particularly valuable refuge areas during the winter and during storm events for

1 juveniles and for migrating and spawning adults. There is a strong positive
2 correlation between coho and percent pools. Human development with resulting
3 changes in the hydrologic regime can lead to stream channelization and **degradation**
4 of the riparian zone, resulting in **loss** of pool frequency and quality. . . .

5 The area of North Creek between 228th Street SE and 240th Street SE is Bothell's
6 only remaining reach of stream that is largely protected and undeveloped. Aside from
7 Thrashers Park, the Fitzgerald subarea reach offers the best habitat with regards to
8 pool to riffle sequencing, spawning gravels, rearing/resting, shade, second old growth
9 canopy, riparian habitat, and LWD. . . .

10 In summary, **maintaining the hydrologic cycle is key to maintaining the function**
11 **of streams and the web of aquatic organisms that depend upon them.**

12 Development of any density may avoid adverse effects on water resources only if:

- 13 • Vegetation cover is maintained that preserves the natural functions of
14 evapotranspiration and infiltration. **This generally means maintenance of**
15 **extensive areas that function as does native forest cover.**
- 16 • **The amount of impervious surface is limited**, or stormwater management,
17 including infiltration system, limit the surface runoff to levels that do not result
18 in erosion and destabilization of stream channels.

19 The Washington State Department of Fish and Wildlife's report entitled *Land Use*
20 *Planning for Salmon, Steelhead and Trout, A Land Use Planner's Guide to Salmonid*
21 *Habitat Protection and Recovery*¹³⁵ states:

22 **Land use strongly interacts with water use to affect how much water and**
23 **velocity is delivered to yield good habitat in streams.** Stormwater runoff is an
24 example of how land use practices can alter natural flow patterns. Excessive flow
25 scours fish habitat (especially spawning habitat), delivers pollutants and pathogens,
26 and brings excess nutrients to surface waters during wet weather. Increased flows
27 can fill up spaces between rocks with fine sediment, resulting in decreased oxygen
28 and concentrated waste. Stormwater runoff can also create decreased flows when
29 rain that is routed to streams from **impervious surfaces** is not routed through
30 groundwater, which can result in low or dry stream reaches and lethal temperature
31 regimes during summer months. . . .

32 Traditional urban and rural development practices remove forests, vegetation and
topsoil, compact soils, and increase impervious surface areas, diminishing the land's
ability to hold and infiltrate rainwater. The remaining water becomes stormwater
runoff, rushing off impervious surfaces such as roofs, roads and compacted soils
instead of infiltrating the soil column. Stormwater runoff can alter substrate conditions

¹³⁵ *Land Use Planning for Salmon, Steelhead and Trout, A Land Use Planner's Guide to Salmonid Habitat Protection and Recovery*, pp. 19 and 39-40 (October 2009), attached to Petitioners' Prehearing Brief, Tab 17 Ex. 101 (April 27, 2015) [emphasis added].

1 by carrying fine sediment to streams, which may reduce spawning gravel quality for
2 salmonids and harm their food sources such as aquatic invertebrates. . . .

3 Habitat functions impacted by stormwater runoff include water quality, flow regime,
4 habitat structure and food source. Stormwater runoff from impervious surfaces also
5 transports contaminants, especially metals, petroleum hydrocarbons, pesticides, and
6 herbicides, to surface waters where suspected synergistic effects may be detrimental
7 to salmonids. Thus, **ecosystem changes resulting from altered stormwater runoff
8 regimes directly and indirectly jeopardize a number of different habitat
9 elements on which salmonids rely.**

10 Ordinance 2163, Exhibit A, Finding 12 states:

11 In 2006, fisheries biologists and wetland scientists made physical inspections of these
12 subareas and concluded that there were **critical areas of high rank order**. City staff
13 with expertise in evaluating surface water features and critical areas have made
14 numerous observations and inspections of these stream systems since 2006 and
15 report that the area continues to support a **high level of fish and wildlife habitat**
and that, while degradation has occurred, Cole and Woods Creeks and the reach of
North Creek located between 240th Street and 228th Street continue to host **the best
fish habitat found within the City.**

16 The Fitzgerald/35th SE Subarea Plan provides for a variety of residential densities “to
17 protect the **large in scope, complex in function and value and high rank order critical**
18 **areas.**” The Plan designates the North Creek Fish and Wildlife Critical Habitat Protection
19 Area as “necessary to protect the **complex structure, functions, values and high rank**
20 **order of the critical areas**” and to “recognize the special environmental significance of the
21 streams and wetlands” with “**complex, high function and value critical habitat for**
22 **anadromous fish and other wildlife.**”¹³⁶

23 On November 18, 2014, Ordinance 2163 enacted these plan amendments:

24 “3. Protect the quantity and quality of cool groundwater inputs into Palm, Woods and
25 Cole Creeks. Implementing regulations should include provisions requiring all
26 development activities ~~which may affect groundwater~~ to follow the existing
27 topographic contours, ~~minimize changes to pre-existing ground elevations,~~ minimize
28 cut and fill earthwork volumes and preserve natural foliage and vegetation.
29 ~~Excavation shall be prohibited from intruding into that part of the groundwater~~
30 ~~table which experiences saturated soil conditions, as measured during the~~
31 ~~dry season.~~”¹³⁷ “4. Within LID portions of the NCFWCHPA, implementing

32 ¹³⁶ Ordinance 2163, Exhibit B-2, pp. FI-1, FI-7 (Nov. 18, 2014).

¹³⁷ Ordinance 2163, Exhibit B-2, p. FI-8 (Nov. 18, 2014).

1 regulations shall include forest cover retention/creation equal to a percentage of the
2 site area ~~and limitation of effective impervious surface coverage to a maximum of a~~
3 ~~percentage of the site area~~ as outlined below:

- 4 • Areas designated R 5,400a (LID) ~~4050%~~ forest cover ~~and 20% effective~~
5 ~~impervious area~~
- 6 • Areas designated R 9,600 (LID) ~~5060%~~ forest cover ~~and 20% effective impervious~~
7 ~~area~~
- 8 • Areas designated R 40,000 (LID) ~~5060%~~ forest cover ~~and 15% effective~~
9 ~~impervious area~~"

10 Forest retention/creation areas may credit critical areas and critical area buffers
11 toward the forest coverage standard. Forest retention/creation areas ~~should be~~
12 ~~encouraged to be located or placed shall be~~ contiguous with critical areas, critical
13 area buffers or existing forested areas to the maximum extent feasible ~~and shall be~~
14 ~~permanent~~.¹³⁸

15 These LID Overlay plan amendments adversely affect Critical Areas within the North
16 Creek Critical Habitat Protection Area and will result in a net loss of ecosystem functions
17 and values. Scientific research has determined that measurable degradation to downstream
18 aquatic habitat occurs where **impervious cover exceeds 5-10%** and **native forest cover is**
19 reduced to **less than 65%** of watershed area.¹³⁹ A licensed Geologist and Hydrologist with
20 water resources experience wrote:

21 By deleting and softening key language in the Code relating to groundwater,
22 stormwater, surface water runoff, impervious surfaces and what is allowable for site
23 grading, the City of Bothell is gravely weakening the environmental protection in the
24 Fitzgerald subarea. . . . Once degraded and urbanized, the critically important
25 hydraulic and riparian functions of the Fitzgerald/35th SE Subarea for North Creek
26 and salmon habitat cannot be recovered and will be lost forever.¹⁴⁰

27 Ordinance 2163 eliminates limitations on impervious surface area, eliminates
28 permanent forest protection/creation areas, reduces forest cover protections, and doubles
29 the cap on problematic non-native trees. Thus, Ordinance 2163 eliminates or reduces pre-

30 ¹³⁸ *Id.*

31 ¹³⁹ *Land Use Planning for Salmon, Steelhead and Trout, A Land Use Planner's Guide to Salmonid Habitat*
32 *Protection and Recovery*, pp. 39-40 (October 2009), attached to Petitioners' Prehearing Brief, Tab 17 Ex. 101
(April 27, 2015) [emphasis added].

¹⁴⁰ Suzanne Burnell Memorandum to City of Bothell dated Nov. 18, 2014, pp. 5-6, attached to Petitioners'
Prehearing Brief, Tab 15 Ex. 35 (April 27, 2015).

1 existing protective standards and therefore fails to protect the functions and values of
2 Critical Area Ecosystems, contrary to Best Available Science in the record. No reasoned
3 justification is provided for departing from Best Available Science. This is a clearly
4 erroneous violation of RCW 36.70A.172 and will result in a net loss of ecosystem functions
5 and values.

6 Further, Ordinance 2163 reduces protections of the functions and values of Critical
7 Area Ecosystems by eliminating the previous prohibition on excavation into groundwater
8 contrary to Best Available Science in the record. This will result in a net loss of ecosystem
9 functions and values. Ordinance 2163 is non-compliant with RCW 36.70A.172 and is clearly
10 erroneous in view of the entire record before the Board and in light of the goals and
11 requirements of the GMA.
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Appendix A: Procedural Matters

Preliminary Matters

A Prehearing Conference was held telephonically on February 27, 2015. Petitioners Ann Aagaard, Judy Fisher, Bob Fisher, and Save a Valuable Environment (SAVE) were present telephonically and were represented by their attorney Allan Bakalian. Glen Conley, President of SAVE, was unable to attend but was represented by Allan Bakalian. Respondent City of Bothell appeared through its attorneys Jane Kiker, Peter Eglick, and City Attorney Joseph Beck. Also present were Bill Wiselogle, Director of Community Development and Bruce Blackburn, Senior Planner. Board members Margaret Pageler and Raymond Paoella attended. Board member Cheryl Pflug convened the conference as the Presiding Officer.

Standing and Jurisdiction

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290 (2). The Board finds the Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2)(a) and (b) and RCW 36.70A.210(6).¹⁴¹ The Board finds it has jurisdiction over the remaining subject matter of the petition¹⁴² pursuant to RCW 36.70A.280(1).

Supplements to the Record

On March 17, 2015, Petitioners filed a Motion to Supplement the Record requesting to include additional maps and figures of the geographic area in question and certain government studies, documents and regulatory implementation manuals believed to be omitted from the City of Bothell's Amended Proposed Record Index dated March 4, 2015.

On April 8, 2015, The City of Bothell filed a Motion to Strike the Fisher Declaration. The motion was denied.

¹⁴¹ Except for Legal Issue 3, view protection, as set forth below.

¹⁴² See n. 2 and discussion *supra* regarding partial dismissal in Issues 2 and 3.

1 **Supplemental Briefing Requested**

2 At the hearing on the merits and by letter on June 15, 2015, the Board requested that
3 the parties each submit a supplemental brief pursuant to WAC 242-03-800 addressing
4 whether Petitioners may challenge the Ordinance for failure to comply with RCW
5 43.21C.030(c) or WAC 197-11-600.¹⁴³ The Board also asked the City to provide copies of
6 Exhibits 45, 47, and 87 with its supplemental brief. Both parties complied.
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¹⁴³ Issue 9, Prehearing Order, *Aagaard v. City of Bothell (Aagaard IV)*, 15-3-0001 (March 4, 2015) at 4.